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No. 84-76 (4)

IN THE

Supreme Court Of The United States

October Term, 1984

NELL HUNTER, et al, individually, and on behalf of all other members of Board of Registrars in the State of Alabama,
Appellants,

vs.

VICTOR UNDERWOOD and CARMEN EDWARDS, for themselves and all others similarly situated,
Appellees.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR APPELLANTS

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QUESTIONS PRESENTED

I. Whether the Court below erred in holding that section 182 of the Alabama Constitution of 1901 violated on account of race the Fourteenth Amendment with respect to those convicted of crimes not punishable by imprisonment in the penitentiary.

II. Whether the Court below erred in failing to recognize the jurisdiction and authority conferred upon the State of Alabama by the Tenth Amendment to the United States Constitution to administer its electoral process, including the conditions under which the right of suffrage may be exercised.

III. Whether the Court below erred in failing to recognize the authority and jurisdiction conferred upon the State of Alabama to disfranchise those convicted of crimes involving moral turpitude pursuant to the "affirmative sanction" language in section 2 of the Fourteenth Amendment to the United States Constitution.

IV. Whether the Court below erred in failing to recognize that the State of Alabama has an interest in disfranchising persons who are convicted of crimes involving moral turpitude, regardless of whether or not the crime is a felony or a misdemeanor and regardless of whether or not the crime is punishable by imprisonment in the penitentiary.

V. Whether the Court below erred in failing to find that section 182 of the Constitution of Alabama of 1901 was not adopted with the intent, and has not had the affect, of disfranchising proportionally more blacks than whites or in the alternative that the Appellants demonstrated the existence of a permissible motive which led to the same result, that is the enactment of section 182 of the Constitution of Alabama of 1901.

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BRIEF FOR APPELLANTS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit upon which this appeal is based appears in 730 F. 2d 614 (11th Cir. 1984) and is included in the Appendix to the Appellants' Jurisdictional Statement, at pp. A-1 to A-14.

The opinions of the United States Court of Appeals for the Fifth Circuit involving prior appeals and dispositions in this case appear in 604 F. 2d 367 (5th Cir. 1979) and 622 F. 2d 1042 (5th Cir. 1980) and are included respectively in the Appendix to the Appellants' Jurisdictional Statement, at pp. B-1 to B-4 and in Joint Appendix filed herein, at pp. A-11 to A-15.

The opinions from which the Appellees eventually appealed to the United States Court of Appeals for the Eleventh Circuit are included in the Appendix to the Appellants' Jurisdictional Statement respectively, at pp. D-1 to D-13 and E-1 to E-7.

GROUNDS OF JURISDICTION OF SUPREME COURT

This appeal arises from an action seeking to have declared unconstitutional on various grounds section 182 of the Alabama Constitution of 1901. The Appellees succeeded in reversing the District Court and prevailing in the United States Court of Appeals for the Eleventh Circuit which held that section 182 of the Alabama Constitution of 1901 violates on account of race the Fourteenth Amendment to the United States Constitution with respect to those convicted of crimes not punishable by imprisonment in the penitentiary. The final judgment of the United States Court of Appeals for the Eleventh Circuit was entered on April 10, 1984. A timely notice of appeal was filed on July 2, 1984 in the United States Court of Appeals for the Eleventh Circuit. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1254 (2) in that a state constitutional provision was invalidated as repugnant to the United States Constitution, specifically the Fourteenth Amendment thereof.

Cases that sustain the jurisdiction of this Court include:

Detroit v. Murray Corp., 355 US 489 (1958)
Chicago v. Atchison, T. & S.F.R. Co., 357 US 77 (1958)
United Gas Pipeline Co. v. Ideal Cement Co., 369 US 134 (1962)
Dusch v. Davis, 387 US 112 (1967)
Bradford Electric Light Co. v. Clapper, 284 US 221 (1931)

CONSTITUTIONAL PROVISIONS INVOLVED

1. Sections 1 and 2 of the Fourteenth Amendment to the United States Constitution:

SECTION 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

SECTION 2

"Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice-president of the United States, representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state."

2. The Tenth Amendment to the United States Constitution:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

3. Section 182 of the Alabama Constitution of 1901:

"The following persons shall be disqualified both from registering, and from voting, namely:

All idiots and insane persons; those who shall by reason of conviction of crime be disqualified from voting at the time of the ratification of this Constitution; those who shall be con-

victed of treason, murder, arson, embezzlement, malfeasance in office, larceny, receiving stolen property, obtaining property or money under false pretenses, perjury, subordination of perjury, robbery, assault with intent to rob, burglary, forgery, bribery, assault and battery on the wife, bigamy, living in adultery, sodomy, incest, rape, miscegenation, crime against nature, or any crime punishable by imprisonment in the penitentiary, or of any infamous crime or crime involving moral turpitude; also, any person who shall be convicted as a vagrant or tramp, or of selling or offering to sell his vote or the vote of another, or of buying or offering to buy the vote of another, or of making or offering to make a false return in any election of any person to any office, or of suborning any witness or registrar to secure the registration of any person as an elector."

STATEMENT OF THE CASE

This case was initiated when the appellees filed a complaint seeking to have declared unconstitutional section 182 of the Alabama Constitution of 1901 insofar as it applied to offenses carrying a penalty of one year or less, that is crimes not punishable by imprisonment in the penitentiary, and to enjoin its further application and for a preliminary injunction to have them, and the class they represented, restored to the voting lists in their respective county or to be allowed to register to vote in their respective county. (J.A. 1) In response, the appellants filed a Motion to Dismiss which raised, among other things, the following:

a. That the State of Alabama had an interest in disfranchising individuals who are convicted of crimes involving moral turpitude pursuant to section 182 of the Alabama Constitution of 1901, regardless of the length, kind or place of confinement, that not being the standard or condition which gave rise to this State interest.

b. That the State of Alabama had a compelling state interest or in the alternative a rational basis for disfranchising those

persons convicted of crimes involving moral turpitude, regardless of the length of sentence.

c. That section 2 of the Fourteenth Amendment to the United States Constitution either expressly allowed or exempted from the operation of section 1 of that Amendment provisions of state law such as section 182 of the Constitution of Alabama of 1901 and conferred upon the State of Alabama the authority to disfranchise moral turpitude misdemeanants. (R. 6)

In later motions and pleadings, the appellants additionally asserted as defenses the right under the Tenth Amendment to the United States Constitution to determine the conditions under which the right of suffrage may be exercised and the right to constitutionally exclude from the franchise those persons convicted of crimes involving moral turpitude.

The District Court, after an evidentiary hearing, overruled appellees' request for injunctive relief and granted the appellants' Motion to Dismiss (R. 24-32, 33-34 and J.S. pp. D-4 to D-14). On appeal, this decision was reversed on a procedural ground not in any way connected with the merits. *Underwood v. Hunter*, 604 F. 2d 367 (5th Cir. 1979) (J.S. pp. B-1 to B-4).[1]

Thereafter, appellees again filed a Motion for Preliminary Injunction in the District Court seeking similar relief to that originally requested. While pending, the appellees filed a Notice of Interlocutory Appeal with the Fifth Circuit and a Motion for Injunction Pending Appeal, again in an effort to gain the opportunity to vote in some upcoming elections. The Motion for Preliminary Injunction was denied by the District Court, the Motion for Injunction Pending Appeal was denied by the Fifth Circuit (R. 49-51 and 58-59) and the appeal was decided adversely to the Appellees as the Fifth Circuit opined that the District Court properly denied the latest attempt for injunctive relief because Appellees failed to demonstrate that any irreparable harm would result if the injunction was not

[1]References to the Jurisdictional Statement filed on behalf of the Appellants in this cause will be cited in the manner above.

granted. *Underwood v. Hunter,* 622 F. 2d 1042 (5th Cir. 1980). (J.A. pp. A-11-15).[2]

Language espoused in dealing with the issues involved is found in the second opinion in *Hunter,* supra, and is as follows:

"Plaintiffs (appellees herein) failed to meet the second element, a showing of irreparable harm. Although each had been disfranchised for conviction of a crime involving moral turpitude, an individual in Alabama can have his right to vote restored if pardoned. ALA. CODE Section 12-15-15, *see* Section 17-3-5. Victor Underwood was purged from the voting list of Jefferson County on April 30, 1977 for conviction of issuing a worthless check and two and one-half to three years prior to the July 19, 1978 hearing on the initial preliminary injunction. Although officials of the Jefferson County Board of Registrars informed Underwood of the procedure for having his voting rights restored, he has made no effort to comply, nor has he alleged any difficulty in complying with this procedure. Carmen Edwards was purged from the voting list of Montgomery County pursuant to her conviction for the crime of issuing a worthless check in May 1978. Although she attempted to receive a pardon, for purposes of restoration of her voting rights, from the Mayor of Montgomery, she was told that she must wait at least a year. She has not sought a pardon since the waiting period has elapsed.

Neither plaintiff, then, has presented any evidence which indicates that a proper application for a pardon would not have been granted. Under these circumstances, we cannot find that granting a Motion for Preliminary Injunction is either necessary or appropriate. . . ."

Subsequently, appellants Motion for Summary Judgment on Appellees' first three causes of action was granted. (R. 65-66 and J.S. pp. D-1 - D-3). After a hearing on the remaining cause of action, specifically the appellees' fourth cause of action which alleged that section 182 of the Alabama Constitution of 1901 was enacted with intent to deprive blacks the right to

[2]This opinion contains an excellent recital of the procedural history of this case through that appeal.

vote, the District Court denied appellees any relief and found in favor of the appellants. (R. 174 and J.S. pp. E-1 - E-7). However, this decision was reversed as reflected in the decision of *Underwood v. Hunter,* 730 F. 2d 614 (11th Cir. 1984) (J.S. pp. A-1 to A-14).

Appellees first three causes of action can be summarized as follows: That the misdemeanors listed in section 182 as disfranchising offenses unconstitutionally infringe upon the franchise because they deny the franchise without a compelling state interest, that the misdemeanors listed in section 182 as disfranchising offenses denied appellees equal protection of the laws because more serious offenses are not disabling and that disfranchisement for conviction of a "crime involving moral turpitude" is based on a definition that is vague and indefinite and denies plaintiffs the right to register and to vote. As stated, the appellants' Motion for Summary Judgment as to these three causes of action was granted and although made a basis of the appellees' appeal to the Eleventh Circuit, these causes of action were not discussed by the Court below as it reached its decision on the basis of the appellees fourth cause of action. The fourth cause of action alleged that the list contained in section 182 was specifically adopted because of its supposed disproportionate impact on blacks with the intent to disfranchise blacks, thereby abridging the right to vote on the basis of race.

Two hearings were conducted in this case. The first was held in July of 1978 and the testimony adduced at that hearing related mainly to the first three causes of action. The evidence at that hearing revealed the following:

Various lists prepared either by the local District Attorney or the State Attorney General were used by the appellants in determining whether a certain crime had been found to involve moral turpitude as well as lists prepared by these offices outlining which crimes disqualified one from voting pursuant to section 182 of the Alabama Constitution of 1901. (R. - 1978 - 27, 28, 33, 34 and 36).[3] Testimony revealed specifically that

the appellants had the use of an Attorney General of Alabama's opinion which specifically opined that the crime of issuing worthless checks was one involving moral turpitude and therefore disqualifying under section 182 of the Alabama Constitution of 1901, that crime being the one for which the named appellees were convicted. (R. - 1978 - 34, 37-38, 57-58). Further testimony revealed that if a crime was not in any of these lists, the local District Attorney's office or the Attorney General's office would be consulted to determine whether the crime was disqualifying. (R. - 1978 - 29, 36, 58-59, 62-63).

In this connection, we would point out that Exhibits introduced at the 1981 hearing established beyond doubt that the Appellants administered section 182 in an impartial manner and without regard to race. Significantly, the Eleventh Circuit in its opinion below recognized the Appellants' good faith in administering this section without reference to race. (J.S. p. A-13).

Appellee Underwood, who is white, was purged from the voting list in Jefferson County, Alabama because of his conviction of the crime of issuing a worthless check. He had been convicted of this crime some two and one-half to three years prior to July of 1978 and had been purged from the voting list in May of 1977. (R. - 1978 - 28, 49). To this date, he has not sought his statutory right and remedy of a pardon which would restore to him the right to vote, although he was aware of the same since May of 1977. (R. - 1978 - 51 and J.A. p. A-14).

Concerning the named appellee Carmen Edwards, she had been convicted in the Montgomery City Court of the crime of issuing a worthless check in May of 1978. (R. - 1978 - 39). Her

[3]Because one hearing made the subject of this appeal occurred in July of 1978, that is the hearing on the Appellees' initial request for a preliminary injunction, and the other occurred in July of 1981, that is on the merits of the Appellees' fourth cause of action, record references to the 1978 hearing will be preceded by designation of the year 1978 and references to the record of the 1981 hearing will be preceded by the designation of the year 1981.

testimony revealed that she was notified that she would have to wait one year before she could apply to obtain a pardon and therefore the right to vote. (R. - 1978 - 41-43). As in the case of Underwood, she has refused to utilize this simple procedure. (J.A. p. A-14).

The second hearing in this case involved the previously explained fourth cause of action. The crux of this hearing involved testimony by expert witnesses from both sides, the appellants' expert being J. Mills Thornton, III, a professor of Southern History at the University of Michigan. (J.A. p. A-16). It was the contention of the State of Alabama at this hearing, as buttressed and amplified by the testimony of Thornton, that section 182 of the Alabama Constitution of 1901 was passed for political reasons, that it was passed with the intent to disfranchise whites as well as blacks, a brief summary of this testimony being as follows.

According to Dr. Thornton, the purpose of the Alabama Constitutional Convention of 1901 in adopting section 182, was *political*, i.e., to repel the populist revolt and to make it impossible for the Democratic party in Alabama to be again challenged. (J.A. p. A-17). In Thornton's opinion, the passage of section 182 was part and parcel and in furtherance of this avowed *political* purpose of the convention. (J.A. p. A-17). Since the populists were made up of predominantly poor whites, and the Democratic party predominantly of rich and conservative whites, the blacks became the block of votes that would decide which party's candidates got elected. (J.A. p. A-19). Therefore, according to Thornton, the following was abundantly clear:

That the disfranchisement of poor whites was an equally important intention and motive of the delegates to the Constitutional Convention of 1901 and the drafters of the Constitutional provisions resulting from the convention as was the disfranchisement of blacks.[4] Section 182 of the Constitution of

[4]In the decision of the Court below, it is held that the appellants did not advance the denial of the franchise to poor whites as a permissible purpose under the second prong of the test announced in *Village of*

Alabama of 1901 was part of the plan, purpose and intention of the delegates to the convention, according to Thornton, to prevent and disfranchise poor whites as well as blacks, for political reasons. (Emphasis supplied) (J.A. p. A-19).

In support for this opinion, Thornton cited various pieces of documentary evidence, articles or written materials published shortly after the Convention, the inner play and applicability of other sections passed by the Constitutional Convention which demonstrated that section 182 applied with equal force and effect and with the purpose to disfranchise poor whites as well as blacks, e.g. section 178, 180 and 194 of the Constitution of Alabama of 1901, sections 178 and 194 being poll tax provisions, which had the effect of disfranchising more whites than blacks, and finally the fact that section 182 was hardly debated or mentioned at all at the convention, a fact recognized and agreed to by the Court below. (J.A. pp. A-19 - A-25). The scant reference to section 182 at the Convention, according to Thornton, was because Alabama's prior constitution, that being the Constitution of 1875, already had a provision that provided for the disfranchisement of any one convicted of a crime which resulted in imprisonment in the penitentiary. (J.A. p. A-23). Section 182 of the Alabama Constitution of 1901 repeated this phrase and then added a long list of crimes. However, each crime listed carried a punishment upon conviction of imprisonment in the penitentiary. Therefore, this listing was unnecessary because these crimes were all included in the general phrase of disfranchisement for conviction of crimes resulting in imprisonment in the penitentiary. (J.A. p. A-23). However, according to Thornton, they were added because the white public associated these crimes with blacks and the behavior of blacks to commit such crimes. This, according to Thornton, was an obvious factor that sec-

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Arlington Heights v. Metropolitan Developing Corp., 429 US 252 (1977). However, it is more than obvious from the above testimony of Thornton that the appellants did introduce evidence in support of their theory that the denial of the vote to poor whites was a permissible motive for the enactment of section 182.

tion 182 was not passed for the sole purpose of disfranchising blacks because, as explained, the Constitution of 1875, although phrased differently, already provided for disfranchisement for the conviction of the same type crimes. (J.A. p. A-23).

Finally, Dr. Thornton testified and emphasized that in reading the proceedings of the Constitutional Convention of 1901 a person should not be misled. The theme of the speeches and debates is to disfranchise blacks and not to disfranchise any whites. However, Thornton cautions that this is misleading and false and was intended only as a public relations ploy in order to convince the white electorate that they should vote for the articles adopted by the Convention because, in reality, after the expiration of the temporary plan, contained in section 180, which would only last 13 months, the entire suffrage article *had the intention to disenfranchise poor whites equally as well as blacks.* (J.A. p. A-27).

The importance of Thornton's testimony on this appeal is two-fold. First of all, it demonstrates that section 182 was not passed with the intention to disfranchise blacks or concomitantly, even if one were to conclude that it was, that there was another and permissible motive, the disfranchisement of poor whites as well.

Before closing it is imperative to note the following. All the crimes listed in section 182 which are not punishable by imprisonment in the penitentiary, and which are still viable, involve moral turpitude. (J.S. p. D-8). Therefore, one can only be disfranchised in Alabama if he is convicted of a felony or a non-felony involving moral turpitude, a non-felony being a crime not punishable by imprisonment in the penitentiary. The issue then becomes whether the state can disfranchise persons convicted of moral turpitude crimes, those being the still viable crimes added by the drafters of section 182.

SUMMARY OF ARGUMENT

Section 182 of the Constitution of Alabama of 1901 was not adopted with the intent, and has not had the effect of, disfran-

chising proportionally more blacks than whites. While there was little or no debate at the Constitutional Convention of 1901 concerning this section and little or no evidence concerning its passage, it is clear that its purpose was political, that it was passed with the intention to repel the populist revolt occurring at the time and to end any future threat to the Democratic Party. This political purpose was achieved by enacting provisions, including section 182, which had the equal and concomitant intention of disfranchising poor whites as well as blacks, while some provisions, specifically the poll tax provisions, having the effect of disfranchising many more whites than blacks. Consequently, the alleged racial intention in passing the provision in question was at least equal to the intention of disfranchising poor whites as well and therefore, the Appellees failed to meet their required burden of proof. Unfortunately, the Court below completely ignored and failed to even consider or discuss any testimony from the Appellants' expert which supported this logical and historically accurate position.

In any event, the Appellants demonstrated the existence of a permissible reason or motive for the passage of section 182, that is this section would have been passed anyway either because its purpose was to disfranchise poor whites as well as blacks, because the State has a right to disfranchise those who commit crimes involving moral turpitude or because the State has the right to enact such provision pursuant to the Tenth Amendment or the Fourteenth Amendment to the United States Constitution. Simply stated, this provision would have been passed and the same result achieved regardless of any allegations concerning illicit motive or protected conduct.

The Appellants submit that the State of Alabama has every right to exclude from voting those who have been convicted of crimes involving moral turpitude, without regard to the length or term of punishment, because of the "affirmative sanction" provision found in section 2 of the Fourteenth Amendment to the Constitution of the United States, as applied and explained in *Richardson v. Ramirez*, 418 US 24 (1974), because they have an interest in purifying the ballot box, to prevent against

violation of election laws and to exclude those from the franchise who have a greater tendency to violate the State's criminal laws, particularly where crimes involving moral turpitude are concerned, *Kronlund v. Honstein,* 327 F. Supp. 71 (N.D. Ga. 1971) and *Washington v. State,* 75 Ala. 582, 585 (1884) or because of the power expressly reserved to the States to set terms and conditions for the qualification of voters at its elections, including the condition of previous criminal record, as recognized in such cases as *Pope v. Williams,* 93 US 622 (1904) and *Lassiter v. Northhampton Board of Elections,* 360 US 45 (1959).

It is clear that a state has a right to disfranchise those who commit crimes involving moral turpitude. It is incongruous and lacking in logic to state on one hand that the State has this right but to ignore this right when one alleges that the vehicle for such disfranchisement was passed based upon an alleged impermissible motive. To carry the rationale and holding of the Court below to its fullest extreme, a provision of law would have to be stricken down which deprived the right to vote to murderers, those persons convicted of election offenses or those who violated the public trust, if it could be shown that a motive in passing such a regulation was an impermissible one. This cannot and must not be the law.

ARGUMENT

I. Rule 52(a) of the Federal Rules of Civil Procedure.

A mistake has been committed. The mistake, however, was not committed by the District Court but by the Court below when it concluded that the District Court's finding of lack of discriminatory intent in the adoption of section 182 was clearly erroneous. (J.A. p. A-6).

There is little room for argument that the clearly erroneous doctrine embodied in Rule 52(a) means that the lower court's finding of fact shall stand unless the reviewing court is left with a definite and firm impression that a mistake has been made. *American National Bank v. Federal Deposit Insurance*

Corp., 710 F. 2d 1528, 1533-34 (11th Cir. 1983). Furthermore, it is clear that this standard of review applies to findings of both subsidiary and ultimate fact, the ultimate factual question in this case being whether or not section 182 was passed with a discriminatory intent. *Pullman-Standard v. Swint*, 456 US 273 (1982). It is also quite clear that the only way the Court below could conclude that the District Court erred in finding that section 182 was not passed with discriminatory intent was to completely and totally ignore the testimony of the appellants' expert, Dr. Thornton. As a matter of fact, a review of the opinion below reveals that reference was made only to the testimony of the appellees' expert without any consideration to the testimony of Dr. Thornton or to the secondary pieces of evidence offered and explained by him. A consideration of his testimony and its support leaves firm the conclusion that the District Court was correct in its finding that section 182 was not passed with a discriminatory intent.

Because the opinion below is highlighted by its failure to consider or even cite the well reasoned testimony of Dr. Thornton and because his testimony is important not only to the present issue but those to follow, it is set forth now in some detail.

As previously eluded to, Dr. Thornton explained that the purpose of the Alabama Constitutional Convention 1901 and adopting section 182 was *political*, that is to repel the populist revolt and to make it impossible for the Democratic party in Alabama to again be challenged. According to Thornton, the passage of this section was part and parcel and in furtherance of this avowed *political* purpose of the Convention. Since the populists were made up of predominantly poor whites and the Democratic party predominantly rich and conservative whites, the blacks became the block of votes that would decide which party's candidates got elected. (J.A. p. A-19). As a result, it was abundantly clear that the disfranchisement of poor whites was an equally important intention and motive of the delegates of the Constitutional Convention of 1901 and the drafters of the Constitutional provisions resulting from the Convention as

well as the disfranchisement of blacks. Section 182 was part of this intention and of the plan and purpose of the delegates to prevent and disfranchise poor whites as well as blacks. (J.A. p. A-19).

In support of this opinion, Thornton cited among other things, the following, all of which failed to appear in any form or fashion or be discussed in any manner by the Court below:

1. According to Thornton, John K. Knox, the President of the Convention, wrote a magazine article in 1905, which, in essence, stated that the purpose of the Convention was to eliminate from the electorate all of the ignorant and the vicious referring equally to both blacks and whites, that being the reason why the temporary plan, or as referred to in the District Court's opinion as the fighting grandfather clause, was limited to only 13 months. (J.A. p. A-20, J.S. p. E-4).

2. According to Dr. Thornton, there were three separate votes at the Convention which defeated proposals to extend the temporary plan, which was codified in section 180 of the Constitution of Alabama of 1901. Since the temporary plan would allow more whites to register to vote, the defeat of these proposals extending the plan is evidence that the delegates to the Convention were equally concerned about disfranchising whites as they were blacks, therefore eliminating the populists, this obviously being done for political reasons. (J.A. p. A-21).

It is important to note that the District Court perceived the significance of this testimony. This is manifested by the following reference in its opinion:

". . . In committee, a provision known as the 'fighting grandfather clause' was developed. . . . Alabama's version, in section 780 (sic.) of the Constitution, allowed the franchise to those descended from veterans of the Revolutionary War, the War of 1812, the war with Mexico, the Civil War for the Confederacy and the Spanish-American War. The bulk of the dedate was on this clause. That portion of the debate concerning the section disfranchising (sic.) for crimes only treated the inclusion of violations of the vagrancy statute.

• • •

. . . However, one point is clearly made. The State has a valid interest in denying the franchise to those convicted of violating its laws . . . The legislative history especially keyed the suffrage provisions to this interest. The expressions of concern around constitutionality by those at the convention who doubted the constitutionality of the suffrage provisions lay elsewhere — on the fighting grandfather clause. There is simply nothing in the legislative history to lead one to decide that the provisions disenfranchising those convicted of crimes are based upon the racism present at the Constitutional Convention." (Citations omitted). (J.S. p. E-4 - E-5).

3. The fact that section 182 was hardly discussed at the Convention. (J.A. p. A-22). Undoubtedly then, the main concern of the Convention as related to suffrage provisions was the fighting grandfather clause found in section 180 of the Constitution, a provision to which section 182 applied.

4. An article written by Frances Caffey in 1905, Caffey being a lawyer practicing in Montgomery at the time of the Convention, wherein he stated that it was generally wished by leaders in Alabama to disfranchise many unworthy white men and to rid the State of the corrupt and ignorant among its electorate, white as well as blacks, again to stem the populist tide. (J.A. pp. A-21-22).

5. The property qualifications, section 181 of the Constitution of Alabama of 1901, the poll tax provisions, sections 178 and 194 of the Constitution of Alabama of 1901 and the crimes provision, section 182 of the Constitution of Alabama of 1901, applied to all persons who were eligible for registration under the temporary plan, that being section 180 of the Constitution. According to Thornton, this is an important factor that the intention Convention was to disfranchise poor whites equally as well as blacks. (R. 1981 - 64-66).

This opinion of Thornton is supported not only historically but logically. Appellees argue that section 181 was enacted to accomplish disfranchisement of blacks because it added re-

quirements of literacy and ownership of property, two requirements which were not included in section 180. But it is the apparent disparity of these two provisions which demonstrates that section 182, itself, was not passed with a discriminatory intent. This is so because both section 180 and 181 of the Alabama Constitution of 1901 set out the individuals who desire to register must not be disqualified under section 182. Consequently, if section 182 was passed solely to disfranchise blacks, then it would certainly seem that those registering under section 180 would not be subjected to the disqualifications under section 182 the same as those individuals registering under section 181, a provision appellees certainly claim was enacted only to disfranchise blacks.

6. The fact that the permanent registration plan, section 181 of the Alabama Constitution of 1901, and as discussed by Dr. Thornton at J.A. pp. A-17-18, would go into effect 13 months after the Constitutional Convention of 1901 and would apply equally to whites and blacks and have the effect of disfranchising from the electorate vicious whites as well as blacks. (R. - 1981 - 67-68).

7. As noted, section 182 was hardly discussed at the Convention. Thornton opines the reason for this is because the Alabama Constitution of 1875 already had a provision which provided for the disfranchisement of anyone convicted of a crime which resulted in imprisonment in the penitentiary. Section 182 repeated this phrase and then added a long list of crimes. However, each crime listed, with rare exception, carried a punishment upon conviction of imprisonment in the penitentiary. Therefore, this listing was unnecessary because these crimes were all included in the general phrase of disfranchisement for conviction of crimes resulting in imprisonment in the penitentiary. Consequently, this is an obvious factor in concluding that 182 was not passed for the sole purpose of disfranchising blacks. This fact, according to Thornton, is in line with the unassailable premise that the intention of the drafters was to disfranchise whites equally with blacks and that these type

measures were needed in order to mislead the whites into favoring these provisions.

8. Appellants' Exhibit 14, ignored by the Court below, which contains many quotations from the book *McMillan, Constitutional Development in Alabama, 1798-1901: A Study in Politics, The Negro and Sexualism,* demonstrating the balancing interest at the Convention of disfranchising whites as well as blacks for political reasons. This exhibit was introduced through Thornton and as an aid to his opinion.

9. The fact that the poll tax provisions, sections 178 and 194 of the Alabama Constitution of 1901 had the effect of disfranchising more whites than blacks and therefore was definitely part of the intention of the drafters to disfranchise poor whites as well as blacks. (J.A. pp. A-23-24).

10. Finally, it is paramount to point out one observation made by Dr. Thornton. He tells us not to be misled by reading or analyzing the proceedings of the Convention. He stresses that it "appears" that the themes of the speeches and debates at the Convention is to disfranchise blacks and not to disfranchise any whites. However, Dr. Thornton unequivocally reasons that this is misleading and false and these debates were intended only as a public relations ploy in order to convince the white electorate that they should vote for the articles adopted by the Convention because, in reality, after the expiration of the time limit set out in the temporary plan, that being section 180, which was only 13 months, the suffrage article had the intention to disfranchise poor whites equally, if not more, as blacks. (J.A. p. A-27).

The District Court correctly found that Section 182 was not passed with discriminatory intent. It also correctly found that the drafters at the Convention were concerned that whites, on sectional and class grounds, would vote, (J.S. E-4). The trial court was not erroneous in these conclusions but rather the Court below was mistaken and erroneous in ignoring and disregarding the testimony of Dr. Thornton and its evidentiary support and in reversing the District Court.

II. The Appellees' Burden and Permissible Motive.

The Eleventh Circuit pronounced that to establish a violation of the Fourteenth Amendment in the face of mixed motives, the Appellees must prove by a preponderance of the evidence that racial discrimination was a substantial and motivating factor in the adoption of section 182. The Appellees shall then prevail unless the Appellants prove by a preponderance of the evidence that the same decision would have resulted had the impermissible purpose not been considered. (J.S. p. A-5).

The Appellants assert that there was a failure to prove by a preponderance of the evidence that racial discrimination was a substantial and motivating factor in the adoption of section 182. To be sure, there was present at the Convention a motive equal to any suggested by the Appellees, that is the motive to disfranchise whites equally with blacks for the purpose of stemming the populist tide. In support of this proposition, Appellants would most earnestly submit the testimony of Dr. Thornton listed above and the evidentiary support for the same as well as the entire amount and kind of evidence introduced below by the Appellants, including affidavit testimony, the efficacy of the same being conceded by the Eleventh Circuit, that the section in question was administered without reference to race. (J.S. p. A-13 and R. p. 48).

In this connection, we cannot agree with the Eleventh Circuit's arbitrary strike of the pen in holding that *Village of Arlington Heights v. Metropolitan Development Corp.*, 429 US 252 (1977) supersedes language in *Palmer v. Thompson*, 403 US 217 (1977) to the effect that a permissible purpose will always defeat an impermissible motive. (J.S. p. A-7). This was the clear holding of *Palmer*, supra, in that the closing of city swimming pools was not found to be unlawful despite proof that the closing was motivated by a desire to avoid integration in light of proof that there was a permissible motive for the same, i.e. economics. *Palmer v. Thompson*, 403 US 217 p. 224. Despite assertions to the contrary by the Court

below, this Court did not disturb that rationale in the case of *Michael M. v. Superior Court of Sonoma County,* 450 US 464 (1981). In *Michael M.,* supra, this Court stated the following in support of the rationale cited above in *Palmer,* supra,

". . . In *Orr v. Orr,* . . ., for example, the Court rejected one asserted purpose as impermissible, but then considered other purposes to determine if they could justify the statute. Similarly, in *Washington v. Davis* . . . the Court distinguished *Palmer v. Thompson* . . ., on the grounds that the purposes of the ordinance there were not open to impeachment by evidence that the legislature was actually motivated by an impermissible purpose. . . ." (Citations omitted.)

Michael M., supra, 450 US 464 at p. 472 n.7.

As a matter of fact, in distinguishing *Palmer,* supra, this Court in *Davis* stated as follows:

". . . that the holding of the case was that the legitimate purposes of the ordinances — to preserve peace and avoid deficits — were not open to impeachment by evidence that the councilmen were *rationally motivated by racial considerations.* . . ." (Emphasis supplied).

Washington v. Davis, 426 US 229, 233 (1976).

Because the evidence is clear that there existed permissible motives for passing 182 or at least ones on an equal footing with any impermissible motive, the Appellees failed to meet their burden of proof. Hence, the Court below erred in holding to the contrary.

Even a finding that the Appellees met their initial burden of proof does not warrant reversal in this case. This is so because there was an obvious and very telling showing made by the Appellants that there were permissible motives which would have led to the passage of 182 without regard to any impermissible motives.

As support for the first permissible motive, that is the denial of the franchise to poor whites, we once again turn to the compelling testimony and evidentiary support offered by Dr. Thornton. Suffice it to say, his testimony reveals the existence

of a motive, at least equal if not superior to any other motive, to disfranchise poor whites for the purpose of stemming the populist tide then threatening to remove the Democratic Party from power. The Eleventh Circuit would have one believe that this motive was not advanced as a permissible purpose by the Appellants. (J.S. p. A-11, n., 12). However, as this Court can see, there was substantial evidence of this purpose. It is significant to note that the Eleventh Circuit apparently recognizes this motive and does not expressly or implicitly, for that matter, deny its existence or state that it is not a permissible purpose. The course chosen by the Court below was simply to ignore its existence.

Yet a separate but perhaps the single most important permissible motive involves the question of whether the state can constitutionally disfranchise those convicted of crimes involving moral turpitude even if the crime for which the individual was convicted carries a maximum sentence of less than 12 months incarceration. In examining this motive, the length of imprisonment is not compelling; rather, the important concern is whether the crime involves baseness, vileness or moral turpitude.

Section 182 allows disenfranchisement under the following circumstances:

1. Conviction of any of the specifically enumerated crimes in that section;
2. Conviction of any crime punishable by imprisonment in the penitentiary;
3. Conviction of any infamous crime; or
4. Conviction of any crime involving moral turpitude.

Since the Appellees concede and do not challenge the above portions of section 182 that allow disfranchisement for conviction of a crime punishable by imprisonment in the penitentiary or for conviction of infamous crimes, it is extremely important to note then that all the enumerated crimes in section 182, with the exception of (1) assault and battery on the wife which is no longer viable because of the case of *Hobson v. Pow*, 434 F. Supp. 362 (N.D. Ala. 1977), (2) living in adultery, which

is a felony only after three convictions and (3) miscegenation which no longer is punishable or viable, are felonies. However, Appellees still argue that the enumerated crime provision is invalid because some of the enumerated crimes have included within them misdemeanors, e.g., if one embezzles or steals under a certain amount of money or value, the conviction can only be a misdemeanor. However, all the crimes that are numerated in section 182 involve moral turpitude, and if the state can constitutionally disfranchise those who commit crimes involving moral turpitude, they can constitutionally disfranchise those convicted of the named crimes, regardless of whether the conviction is for a misdemeanor commission of the same. Significantly enough, the District Court in one of its opinions below found that all the non-felony crimes enumerated in section 182 which are now viable are crimes involving moral turpitude, a finding which is not contested or argued. (J.S. p. D-8).

To support the existence of this permissible motive we could begin by examining this Court's decision in *Richardson v. Ramirez,* 418 US 24 (1974). In analyzing that case, the following language from one of the opinions of the District Court states succinctly the Appellants' position:

. . . "The Court found 'affirmative sanction' in the second section of the Fourteenth Amendment. That section forbids the denial of the right to vote 'except for participation in rebellion, *or other crime*' . . . Although some of the discussion of the legislative history of the second section of the Fourteenth Amendment speaks specifically of felonies known at common law, the actual language of the section speaks only of 'any crime', and the Court is of the opinion that *Ramirez* may be properly applied to cases involving crimes other than felonies . . . ." (J.S. p. D-10).

A close study of the *Ramirez* opinion also demonstrates that the legislative intention was not to limit section 2 to felonies only but rather to have it applied to "other crimes". This sentiment is expressly seen in the following language from *Ramirez*:

". . . the legislative history bearing on the meaning of the relevant language of section 2 is scant indeed; the framers of the Amendment were primarily concerned with the effect of reduced representation on the states, rather than with the two forms of disenfranchisement which were exempted from that consequence by the language with which we are concerned here. *Nonetheless, what legislative history there is indicates that this language was intended by Congress to mean what it says.*" (Emphasis supplied)

Richardson v. Ramirez, 418 US 24, 43 (1974). Moreover, as this Court noted, the House of Representatives, where most of the debate took place on section 2, clearly intended this section not to be limited to felonies only but also to other crimes. *Richardson v. Ramirez,* 418 US 24, 45 (1974).

More importantly, *Ramirez,* supra, is authority for the proposition that a state may disfranchise some individuals that have committed crimes carrying a maximum punishment of less than 12 months incarceration and not others. As stated by Mr. Justice Renquist,

". . . Although the Court has never given plenary consideration to the precise question of whether a state may constitutionally exclude some or all convicted felons from the franchise, we have indicated approval of such exclusions on a number of occasions. In two cases decided toward the end of last century the Court approved exclusions of bigamists and polygamists from the franchise under territorial laws of Utah and Idaho . . . Much more recently we have strongly suggested in dicta that exclusion of convicted felons from the franchise violates no constitutional provision. In *Lassiter v. Northhampton County Board of Elections,* . . . ., where we upheld North Carolina's imposition of a literacy requirement for voting, the Court said 'residence requirements, age, previous criminal record . . . are obvious examples indicating factors which a state may take into consideration in determining the qualification of voters.' " (Citations omitted)

Richardson v. Ramirez, 418 US 24, 53 (1974).

Appellants would be remiss if they did not point out even what is obvious. *Lassiter,* supra, and the language from that case quoted above, makes no limitation in citing previous criminal record as a factor a state may take into consideration in determining the qualifications of voters. Certainly this case gives more than ample support for the position that a previous criminal record which includes the conviction of a crime involving moral turpitude is a permissible motive in disfranchising a voter.

This analysis poses an obvious conflict for this Court to decide. The Court below concluded that section 182 violated section 1 of the Fourteenth Amendment to the United States Constitution. However, it is now submitted that the State of Alabama has the right, pursuant to section 2 of the Fourteenth Amendment, to disfranchise those convicted of moral turpitude misdemeanors. If this is so, then the Court below erred in its holding. While not admitting that the framers of section 182 had the intention to discriminate against blacks, even if this was the case, the State of Alabama, pursuant to section 2 of the Fourteenth Amendment, would have the authority to still disfranchise moral turpitude misdemeanants. This Court's reliance on *Lassiter,* supra, and especially the language from that case recognizing the ability of the State to consider a previous criminal record in deciding the qualifications of voters, in reaching a decision in *Ramirez,* supra, suggests that the State of Alabama cannot be condemned for what happened in this case.

The significance of this rationale did not escape the Fifth Circuit in *Shepard v. Trevino,* 575 F. 2d 1110 (5th Cir. 1978), where the Court was presented with an equal protection argument concerning the re-enfranchisement of convicted felons. There, the State of Texas provided a mechanism for the re-enfranchisement of those convicted of state felonies but not those of federal felonies. On this ground, federal felons brought an action contending violation of the equal protection clause of the Fourteenth Amendment. The Fifth Circuit rejected these equal protection claims and held that the Texas

system of allowing subsequent re-enfranchisement of convicted state felons but not convicted federal felons was valid. Accordingly, this rationale which would sanction different treatment among the same class of individuals, i.e. felons, must be authority for sanctioning the difference in treatment among the same class of individuals in this case, that is misdemeanants. And, in examining previous criminal record and those whom shall be disfranchised, the state may attach more significance to crimes involving moral deprivity or baseness. See *Oregon v. Mitchell,* 400 US 117 (1970).

Although the disfranchisement herein question is sanctioned by section 2 of the Fourteenth Amendment, it is the additional contention of the Appellants that the State of Alabama has a compelling interest in disfranchising those who commit crimes involving moral turpitude, regardless of the length of punishment for the commission of such a crime. Consequently, the reason for the passage of section 182 would make no difference, the State not admitting in advancing any such argument that section 182 was passed with any discriminatory intent. In this regard, we would direct this Court to *Kronlund v. Honstein,* 327 F. Supp. 71 (N.D. Ga. 1971). In that case the plaintiff attacked a section of the Georgia Constitution on the ground that it unconstitutionally deprived her of rights guaranteed by the equal protection clause of the Fourteenth Amendment and by the First and Eighth Amendment to the Constitution. The provision in issue there, section 2 - 801 of the Georgia Constitution, disqualified those from voting who had been convicted of certain listed crimes or of any crime involving moral turpitude punishable by imprisonment in the penitentiary. Plaintiff had been convicted of smuggling heroin into the United States, a crime determined by the District Court to involve moral turpitude.

The *Kronlund* Court rejected plaintiff's contention that the provision was unconstitutional on its face and as applied to her. The Court recognized that a State may constitutionally disfranchise otherwise qualified voters because they have been convicted of a felony. However, the *Kronlund* Court went fur-

ther and found that disfranchising only those convicted of moral turpitude crimes and not those convicted of non-moral turpitude crimes served a compelling state interest. In so holding that Georgia had a compelling state interest in disfranchising those convicted of crimes involving moral turpitude, the Court noted as follows:

"A State has an interest in preserving the integrity of her electoral process by removing from the process those persons with proven anti-social behavior, whose behavior can be said to be destructive of society's aims. For this reason, a State may prohibit idiots and insane persons as well as those convicted of certain offenses from participating in her elections. A State may also legitimately be concerned that persons convicted of certain crimes may have a greater tendency to commit election offenses. Therefore, Georgia has a compelling State interest sufficient to justify the voting restrictions set forth in section 2-801 of the Georgia Constitution. Since the State does have this legitimate interest to protect, this provision does not unjustifiably abridge the plaintiff's First Amendment rights." *Kronlund v. Honstein,* supra, 327 F. Supp. 71, p. 73.

Not enough importance can be attached to the reasoning found in the case of *Washington v. State,* 75 Ala. 582 (1884). In that case, the Alabama Supreme Court, in a racially neutral context, some 17 years before the Constitutional Convention of 1901, recognized that the State had an interest in disfranchising those who had been convicted of a crime involving moral turpitude. As stated by the Court

". . . The presumption is that one rendered infamous by conviction of a felony *or other base offense indicative of great moral turpitude* is unfit to exercise the privilege of suffrage, or to hold office upon terms of equality with free men who are clothed by the State with a toga of political citizenship . . . ." (emphasis supplied)

Washington v. State, 75 Ala. 582, 585 (1884).

In concluding that the Appellants failed to meet their burden of proof that section 182 would still have been adopted had a permissible state reason been the sole consideration, the

Court below did not even discuss, let alone mention, the interest of the State in disfranchising moral turpitude misdemeanants pursuant either to the rationale concerning the *Ramirez,* supra case or the rationale espoused in *Kronlund,* supra. Instead, the Court held that it was unable to discern any evidence that section 182 was actually intended to serve the State interest in denying the franchise to those convicted of violating its laws, assuming without deciding that this asserted State interest would pass constitutional muster. (J.S. p. A-12). In support of that conclusion, the Court incredibly notes that there are glaring omissions from the non-prison offenses resulting in disfranchisement under section 182. It is this statement by the Court below which clearly portrays their failure to understand the issue involved and their misapplication of the appropriate and controlling law.

Obviously, the Court below is attaching great significance to the fact that all crimes not punishable by imprisonment in the penitentiary were not disfranchising, opining that if the Convention truly wished to vindicate a "good government" purpose it would have included such language in section 182. (J.S. p. A-12). However, the only non-prison offenses resulting in disfranchisement which are still viable in Alabama are either felonies or crimes involving moral turpitude. Clearly, the inclusion of a provision allowing disfranchisement for crimes involving moral turpitude was not meant to include all non-prison offenses, the interest and concern of the State being to disfranchise those only who committed crimes involving this element. Moreover, as already explained by Dr. Thornton, the listing of these specific offenses in section 182 changed nothing from the effect of the Constitution of 1875.

While criticizing the Appellants for underinclusiveness, the result reached by the Eleventh Circuit results in absurd consequences. In Alabama, the difference between grand or petty larceny, for example, is determined by the amount stolen, the determinative amount now being $25. Consequently, if one shoplifts articles of clothing from a store having a value of $25.01 they will be convicted of a felony and not be allowed

to vote while their partner, at the same time, could steal articles of clothing worth $24.99, and because this is a misdemeanor, still be allowed to vote. Such a situation defies logic and strips the State of its ability to disfranchise moral turpitude offenders. See *Butts v. Nichols,* 384 F. Supp. 573 (S.D. Iowa 1974). By trying to remove from the franchise those persons who have committed crimes involving moral turpitude, the State is simply trying to preserve the purity of the franchise. *Hobson v. Pow,* 434 F. Supp. 362 (N.D. Ala. 1977) and *Washington v. State,* 75 Ala. 582, 585 (1884) wherein it is recognized that the purpose of the denial of the right of suffrage was to preserve the purity of the ballot box.

While the above discussion demonstrates the propriety of disfranchising those convicted of moral turpitude crimes regardless of whether the crime is a felony or misdemeanor, there are some specific examples of cases where individuals have lost important rights on the basis of a conviction of a misdemeanor. In *Waddy v. Davis,* 445 F. 2d 1 (5th Cir. 1971), the plaintiffs pled guilty to receiving unemployment compensation benefits by reason of misrepresentation, this crime being a misdemeanor and one involving moral turpitude. Because of this conviction, which carried a punishment of a fine of not less than $25 nor more than $250 or imprisonment for no longer than 3 months or both, plaintiffs were stricken from the voting list because the crime involved moral turpitude.

The Fifth Circuit, in affirming the District Court's dismissal of plaintiffs' complaint which alleged they had not been advised they would be removed from the voting list at the time of their guilty plea, found the crime in question to be one involving moral turpitude and then stated the following:

"Plaintiff did not here contest the principle that the privilege of voting in a state is within the jurisdiction of the state itself, to be exercised as the state may direct and upon such terms as to it may seem proper, provided no discrimination is made between individuals in violation of the United States Constitution . . . The denial of the voting franchise to convicted

criminals raises no substantial constitutional question . . . ." (Citations omitted)

Waddy v. Davis, 445 F. 2d 1, 2-3 (1971). See *United States v. Tonry,* 605 F. 2d 144 (5th Cir. 1979), where the Court rejected a claim that an individual's First Amendment right had been denied where, as a condition to probation based upon guilty pleas to four misdemeanor violations, he was forbidden from running for any state or local office or engaging in political activity during the term of his probation.

In the face of these multitude of factors, this Court should have no difficulty in reversing the Court below and finding that there was in existence permissible motives which would have compelled the passage of section 182 in any event.

It cannot be gainsaid that the Tenth Amendment to the United States Constitution reserves unequivocally to the State their right to administer the electoral process and to set qualifications and conditions upon the exercise of the franchise. *Pope v. Williams,* 93 US 622 (94). There can be no argument that:

". . . to be sure, the administration of the electoral process is a matter that the constitution largely entrusts to the State . . . ."

Kusper v. Pontikes, 414 US 51 (1933).

It is suggested that at no time, despite frequent opportunity to do so, has this Court ever undermined or weakened this power left specifically to the States by the Tenth Amendment. Quite to the contrary, when given the opportunity, this Court has written sweeping and persuasive comments concerning the power of the State to control their elections, e.g. *Lassiter v. Northhampton County Board of Elections,* 360 US 45 (1959) and *Oregon v. Mitchell,* 400 US 112 (1970). As previously explained, this Court in *Lassiter* recognized the wide scope the State had in exercising its jurisdiction concerning the qualifications of voters, including previous criminal record. Moreover, and important for the purposes of this appeal, is the fact that this Court in *Lassiter,* supra, recognized the following:

"So while the right of suffrage is established and guaranteed by the Constitution . . . it is subject to imposition of the State standards which are not discriminatory and which do not contravene any restriction of Congress, acting pursuant to its constitutional powers, has imposed . . . ."

Lassiter v. Northhampton County Board of Elections, 360 US 45 (1959).

In reviewing this quote, it is significant to point out that in *Lassiter*, supra, this Court placed great weight on the fact that the literacy test was being applied in an equal and nondiscriminatory manner. Likewise, as admitted by the Eleventh Circuit in this case, the provisions of section 182 in question have been and are being implied in a neutral and nondiscriminatory manner.

Furthermore, these meaningful words from Mr. Justice Black have crucial significance to this case:

". . . It is obvious that the whole Constitution reserves to the States the power to set voter qualifications in State and local elections, except to the limited extent that the people through constitutional amendments have specifically narrowed the powers of the States . . . And the Equal Protection Clause of the Fourteenth Amendment was never intended to destroy the State's power to govern themselves . . . ." (Citations omitted)

Oregon v. Mitchell, 400 US 117, 27 L.Ed. 2d 272, 283, 91 S.Ct. 260 (1970). See also *Duncan v. Piothress*, 657 F. 2d 691, 702 (5th Cir. 1981), *United States v. Tonry*, 605 F. 2d 134, 148-149 (5th Cir. 1979) and *Holley v. Askew*, 583 F. 2d 728, 730 (5th Cir. 1978).

The opinion of the Court below has the effect of conflicting and interfering with these previous pronouncements of this Court. Section 182 allows disfranchisement for felonies and for crimes involving moral turpitude, whether felonies or not. This certainly seems to be a restriction within the realm of the authority and jurisdiction left to the states by the Tenth Amendment and as reinforced by this Court in the decision

cited above, especially in the context of a statute neutral on its face which has been uniformly applied. To elect to disfranchise non-felons who commit crimes involving moral turpitude is certainly within the sphere contemplated by the Tenth Amendment, it being obvious that in determining an individual's previous criminal record the State may attach more significance to crimes involving moral depravity or baseness, for such a distinction does not offend the equal protection clause of the Fourteenth Amendment. *See Oregon v. Mitchell*, supra.

The decision of the Court below violates the Tenth Amendment right of the State of Alabama to control its elections and to set the qualifications for the voters. To hold otherwise would destroy the complicated fabric woven by the framers of the United States Constitution and ratified by this Court in dealing with matters left to the States for consideration or ones in which the States interest must succumb to that of the Federal Government.

CONCLUSION

The Eleventh Circuit committed an eggregious error by authoring an opinion which violates and intrudes upon the very essence of our Constitution and system of government. They have told the State of Alabama that a provision allowing disfranchisement for the commission of a listing of crimes which were almost unanimously felonies or involved moral turpitude or for the commission of moral turpitude crimes generally is unconstitutional. They have told the State of Alabama that they could never pass a law which disfranchises individuals who commit moral turpitude crimes if there is also in existence an alleged impermissible motive, even though the provision in question is neutral on its face and has been applied in a nondiscriminatory manner. Carrying the logic of the Court below to its most unfortunate extremes, a law providing disfranchisement for murderers or for people who have been convicted of a violation of the public trust or election offenses would be striken down if there was also evidence that such a law was

passed because of the alleged existence of an impermissible motive.

Without admitting any discriminatory intent, Appellants would simply say that it would make no difference what their intentions were because the provision in question merely fulfilled a valid state interest, that is disfranchising those who have been convicted of crimes involving moral turpitude.

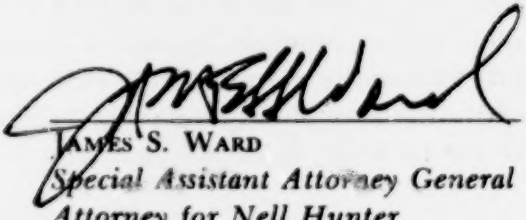
Obviously, the Court below failed to recognize the existence of permissible motives for the enactment of section 182 thereby allowing a State constitutional provision over 80 years in age to be striken. The Court below failed to consider evidence concerning the intention of the delegates to the Alabama Constitutional Convention of 1901 and in so doing did not consider the possibility of the existence of an intention equal to the one they found to be impermissible. In the face of a permissible and impermissible motive, the Court below failed to give any consideration to the permissible motive and chose rather to strike down the provision in question. In so doing, the Court below incorrectly interpreted this Court's decisions and as a result has unconstitutionally applied the Fourteenth Amendment to reach an erroneous result.

Moreover, the Court below failed to consider the right of the State, pursuant to the Tenth and the Fourteenth Amendment or because of an interest in purifying the ballot box or denying the vote to those convicted of violating its laws, to disfranchise those who commit crimes involving moral turpitude regardless of the length of confinement. These constitutional provisions serve as more than ample authority for permissible motives by the State of Alabama in enacting section 182 and also demonstrate the fact that the provision would have been enacted if the alleged impermissible motive had not been considered at all. It is incongruous and lacking in logic to state on one hand that the State has the right to disfranchise those who commit crimes involving moral turpitude but to ignore this right when one alleges that the vehicle for such disfranchisement was passed based upon an impermissible motive.

We can only conclude the Appellants demonstrated that the Appellees failed to carry their burden, that the Appellees carried theirs or that the Appellants had a constitutional right or separate state interest to pass the provision in question. In holding otherwise, the Court below erroneously voided as repugnant to the United States Constitution section 182 of the Alabama Constitution of 1901.

Based on the foregoing and all contained in this Brief, whether case law, evidence or argument, Appellants implore this Court to reverse the judgment of the Eleventh Circuit Court of Appeals and to affirm the Order of the District Court upon which this appeal was based.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, James S. Ward, a member of the Bar of the Supreme Court of the United States and counsel of record of Nell Hunter, et al, individually and on behalf of all other members of Board of Registrars in the State of Alabama, appellants herein, hereby certify that on November 21, 1984, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Brief for Appellants on each of the parties herein as follows:

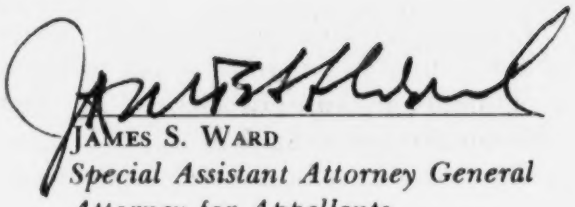
On Victor Underwood and Carmen Edwards, for themselves and all others similarly situated, appellees herein, by depositing such copies in the United States Post Office, Birmingham, Alabama, with first class postage prepaid, properly addressed to the post office address of Edward Still and Neil Bradley, the above named appellees counsel of record, at Edward Still, Suite 400, Commerce Center, 2027 First Avenue North, Birmingham, Alabama 35203 and Neil Bradley, ACLU Foundation, 52 Fairlie Street NW, Atlanta, Georgia 30303.

On the Solicitor General, Department of Justice, by depositing such copies in the United States Post Office, Birmingham, Alabama, with first class postage prepaid, properly addressed to the post office address of The Solicitor General, Department of Justice, Washington, D.C. 20530.

On William Bradford Reynolds, Assistant Attorney General, Charles J. Cooper, Deputy Assistant Attorney General and Brian K. Landsberg, Esquire, by depositing such copies in the United States Post Office, Birmingham, Alabama with first class postage prepaid, properly addressed to the post office address of William Bradford Reynolds, Assistant Attorney General, Charles J. Cooper, Deputy Assistant Attorney General and Brian K. Landsberg, Esquire, United States Department of Justice, Washington, D.C. 20530.

All parties required to be served have been served.

Dated: November 21, 1984



JAMES S. WARD
Special Assistant Attorney General
Attorney for Appellants

AFFIDAVIT OF SERVICE

STATE OF ALABAMA)
JEFFERSON COUNTY)

I, James S. Ward, depose and say that I am an attorney in the law firm of Corley, Moncus, Bynum, & DeBuys, P.C. and I am the attorney of record for Nell Hunter, et al, individually and on behalf of all other members of Board of Registrars in the State of Alabama, the appellants herein, and that on the 21st day of November, 1984, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Brief for Appellants on each of the parties required to be served herein, as follows:

On Victor Underwood and Carmen Edwards, for themselves and all others similarly situated, appellees herein, by depositing such copies in the United States Post Office, Birmingham, Alabama, with first class postage prepaid, properly addressed to the post office address of Edward Still and Neil Bradley, the above named appellees counsel of record, at Edward Still, Suite 400, Commerce Center, 2027 First Avenue North, Birmingham, Alabama 35203 and Neil Bradley, ACLU Foundation, 52 Fairlie Street NW, Atlanta, Georgia 30303.

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All parties required to be served have been served.

JAMES S. WARD
Special Assistant Attorney General
Attorney for Appellants

Sworn to and subscribed before
me this the 21st day of November, 1984.

Notary